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IN THE

# Supreme Court of the United States

October Term, 1943

No. 396

FRED M. VINSON, Director of Economic Stabilization, by CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

## BRIEF OF RESPONDENT WASHINGTON GAS LIGHT COMPANY.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (R. II, 427-449) is reported at 137 F. (2d) 547. The opinion of the District Court (R. I, 15-20) is reported at 48 F. Supp. 703. The findings and opinion of the Public Utilities Commission of the District of Columbia (R. I, 39-57 and R. II, 271-317) are reported at 46 P. U. R. (N. S.) 1.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1943 (R. II, 451). The petition for writ of certiorari was granted on November 8, 1943. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code (as amended by the Act of February 13, 1925) 28 U. S. C. A. § 347a. See also D. C. Code (1940) § 43-705.

## STATUTES INVOLVED

Section 1 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), Supp. II, Section 961, reads as follows:

> "That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide

for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Italics supplied.)

The pertinent parts of this and other statutes involved are set forth in the Appendix, *infra*, pp. 55-64.

## STATEMENT

Washington Gas Light Company (hereinafter referred to as the "Company") was incorporated under Act of Congress in 1848 (9 Stats. 722) and since shortly after its incorporation has been continuously and is now engaged in the manufacture and distribution of gas to consumers in the District of Columbia. The Public Utilities Commission of the District of Columbia was created by Act of Congress on March 4, 1913 (37 Stats. 974), and continuously since that time it has been and now is the administrative body charged with the regulation of the affairs of public utilities doing business in the District of Columbia, including the Company.

Among other duties, the Public Utilities Commission is charged with responsibility for fixing the rates of public utilities within its jurisdiction (see D. C. Code, Section 43-301). In furtherance of this duty, the Act provides (D. C.

Code, Section 43-306) that "The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation." The Act provides further (D. C. Code, Section 43-317) that "a public utility, with the consent of the commission, may provide a sliding scale of rates. * * * Such arrangement shall be under the supervision and regulation of the commission."

Pursuant to its duties under Section 43-306 of the Code, the Commission in 1931 ordered an investigation of the Company to determine the value of its properties. On March 19, 1935, after prolonged hearings, the Commission issued its Order No. 1341, determining the value of the property of the Company as of June 30, 1932 (Tr.* II, 124). A similar order was handed down on the same date with respect to The Georgetown Gaslight Company (a wholly owned subsidiary, since merged with the Company) (Tr. II, 239). Following the issuance of the valuation orders, the Commission conducted hearings for the determination of the rates to be charged by the Company, and before these hearings were completed, the Commission and the Company entered into a sliding scale arrangement for the determination of gas rates, after a public hearing, pursuant to Section 43-317 of the Code (Order No. 1458, Tr. II, 256).

The sliding scale arrangement fixed a rate base (to be adjusted annually by adding net property additions at cost), a rate of return, and a rate for the accrual to the retirement reserve, and prescribed a method for the annual determina-

*Refers to original transcript of record filed in this Court.

tion of rates to be charged by the Company, which in effect resulted in reductions of rates when a return in excess of the basic rate of return was earned, and in an increase of rates when a return less than the basic rate of return was earned. It was provided by the sliding scale arrangement that rate adjustments should take effect on September 1st of each year and should be based on the operating results of the year ending the previous June 30th.

The duration of the sliding scale was not prescribed in Order No. 1458, but the Commission stated in such Order that it interpreted Section 43-317 of the Code to permit the termination of the sliding scale arrangement upon reasonable notice, and after finding that the sliding scale arrangement proposed was practicable and would be advantageous to all interested parties, the Commission found that ninety days' written notice of termination of the sliding scale arrangement by either the Commission or the Company would be reasonable (Tr. II, 268). No notice of termination of the sliding scale arrangement has ever been given, either by the Commission or by the Company.

At the time of the entry of Order No. 1458 in December 1935, the rates of the Company were reduced by approximately $850,000 per annum (Tr. I, 143). In each year subsequent to 1935, annual hearings under the sliding scale have been held, and these have resulted in further reductions of rates of the Company in each of the years 1936, 1938, 1939 and 1940 (Exhibit 11, R. II, 421). In 1937 and 1941 there were no reductions and no increases in rates. The year 1942 is the first in which the sliding scale called for an increase in rates. The effectiveness of the sliding scale is demonstrated by the ease and simplicity with which it operated prior to the 1942 proceeding. In each year hear-

ings were held during the month of August; they were completed within one or two days; and the Commission's findings and order were issued in ample time to make the new rates effective on September 1, as provided in the sliding scale arrangement.

During this period (1935-1942) the Company sold to the public substantial issues of its bonds and preferred stock, and a large block of the common stock of the Company had been sold in a wide public distribution (Tr. I, 2265). In the registration statements filed with the Securities and Exchange Commission as a basis for the issuance and sale of these securities, the sliding scale was fully described and the facility of its operation in the determination of rates was emphasized.

Such was the background of rate regulation of the Company under the sliding scale arrangement when in 1942 that arrangement approached its critical test, namely, whether it would be permitted to operate to increase rates, rather than to decrease them, as had been the case in the past. Was the sliding scale arrangement to be accepted only so long as it produced rate reductions, or was it to continue to furnish a stable and expeditious method of determining rates, whether such determination increased or decreased rates?

On March 20, 1942, the Commission issued its usual annual order directing that an investigation be made relative to the rates of the Company in conformity with the sliding scale arrangement (R. I, 33). During the period from April 1942 to August 1942, the usual detailed investigation of the Company's affairs was made by the staff of the Commission (R. I, 88), and on July 21, 1942 the Commission gave formal notice of the public hearing to be held in August (R. I, 34). On August 14, 1942 a prehearing conference was held, which was attended not only by the

Commission, its staff, and the staff of the Company, but also by Utilities Counsel of the Office of Price Administration (the same counsel who appeared throughout all of the proceedings subsequent to that date, and who argued the case in the United States District Court and the United States Court of Appeals). (R. I, 61, 73.)

The hearings commenced on August 18, 1942, and at that time the counsel for the Office of Price Administration filed his petition for leave to intervene which was granted (R. I, 34-37, 61, 73). Experts from the Commission's staff testified that the Company was entitled to a rate increase of $324,718.06 (R. I, 90, Ex. 1, Sched. 1, R. I, 230). The Company's computation indicated an increase of $381,597 (R. I, 103, 233, Ex. 2). Throughout the hearing, counsel for the Office of Price Administration insisted that the scope of the proceedings be enlarged to permit a detailed investigation of the elements of the sliding scale arrangement itself, including the rate-base, rate of return and rate of depreciation accrual. The Commission declined to enlarge the scope of the proceedings but repeatedly invited the presentation of evidence regarding the national price control program and the possibly inflationary character of an increase in rates (R. I, 123, 133, 138-139, 145-146).

The hearings were closed on September 30, and on October 13, 1942, the Commission issued its opinion and order, Order No. 2401, in which it approved a rate increase of $201,424.74 and in which it prescribed new rates effective September 1, 1942 (R. I, 39-57). (In fact, the new rates did not become effective until November 16, 1942.)

In the interim between the closing of the hearings and the issuance of Commission's opinion and order, the Stabilization Act of October 2, 1942 had been enacted by Congress. Pursuant to this Act, and promptly after

the issuance of Order No. 2401, the Company gave the requisite notice, on October 14, 1942, to the Director of Economic Stabilization, who had been designated to receive notices under the Act (R. I, 188). On October 19, 1942, the Price Administrator, on behalf of the Director of Economic Stabilization, petitioned (R. I, 57-60) the Commission for a reopening of the proceedings, vacation of the Commission's prior order (No. 2401), and for leave to intervene in the reopened proceedings, the Company consenting to such intervention (R. I, 191). The Commission thereupon, on October 23, 1942, issued its Order No. 2404 (R. I, 60) in which it granted the prayer that the proceedings be reopened, and granted the petition for leave to intervene for the purpose of receiving from the intervenor "additional evidence relating to the inflationary effect, if any, of the increase in rates".

In granting intervention in the reopened proceeding, the Commission acted pursuant to its Rule No. 7.3, which provides that the Commission may grant or deny intervention, and if it grants intervention may do so upon such terms as it prescribes. The Commission's rules (Rule 7.5) also provide that when leave to intervene is granted by the Commission the effect thereof shall not be to change or enlarge the issues in the proceeding.

At the reopened proceedings, which began on November 2, 1942, the Price Administrator on behalf of the Director of Economic Stabilization appeared by the same counsel who had represented the Office of Price Administration in the prior proceedings (R. I, 66).

Although the proceedings were reopened by the Commission for the purpose of receiving evidence on the inflationary effect, if any, of the rate increase authorized by

its Order No. 2401, such evidence was not forthcoming. However, counsel for the Price Administrator reiterated his contention that the scope of the proceedings should be broadened to include an investigation of the elements of the sliding scale arrangement. The Commission (Order No. 2418) characterized the reopened hearings as follows:

> "No testimony was adduced by the Price Administrator at the reopened hearing on November 2, and at the conclusion of the hearing on that date, counsel for the Price Administrator moved that the case be continued until 10 o'clock a.m. on November 4 in order to permit him to consult with his associates as to future steps to be taken in the proceeding. Accordingly the hearing was continued until November 4, at which time counsel for the Price Administrator presented evidence to show that the amount used by the Washington Gas Light Company for Federal income taxes in its determination of the amount available for increase in rates under the sliding scale arrangement was overstated by approximately $18,000.00. This was due to the fact that the Revenue Act of 1942 as finally approved contained a provision exempting from surtaxes that portion of the Company's income paid out as preferred stock dividends, which provision was not included in the draft of the bill upon which the original computation for income taxes was made. This was the only evidence offered." (R. I, 66, 67.)

Accordingly, on November 9, 1942, the petition of the Director that Order No. 2401 be vacated was denied. The Commission said (Order No. 2418):

> "The evidence adduced fails to show that the rates authorized by Order No. 2401 are inflationary." (R. I, 67.)

The new rates prescribed by Order No. 2401, although effective as of September 1, 1942 as provided in the sliding scale arrangement, were not actually charged by the Company until November 16, 1942, more than thirty days after the Company's notice to the Director of Economic Stabilization of October 13, 1942. The new rates were not charged retroactively to September 1, 1942.

The record shows that representatives of the Office of Price Administration and of the Director of Economic Stabilization were present at every hearing of the Commission, presented briefs to the Commission, requested and received adjournments, cross-examined witnesses, and participated in the hearings, as though parties to the proceedings.

The petitioners appealed from Order No. 2401 which had granted the rate increase referred to, and from Order No. 2404. (R. I, 2, 237). The appeal taken by the petitioners to the District Court was decided in their favor, and it was held there that the Commission's action had been "arbitrary and illegal" in refusing to make an investigation of the rate base, rate of return, and depreciation accruals as demanded by the petitioners (R. I, 18).

The Court of Appeals reversed the District Court and upheld the order of the Commission, holding (R. II, 427-449) that the Commission's discretion as to the scope of the hearing was unfettered by the Act of October 2, 1942 and the intervention of the petitioners. The Court held that the proceedings before the Commission had been fair and complete and that the petitioners had no standing to complain of the Commission's action. The Court said:

> "It is not reasonable to suppose that Congress intended to abrogate or repeal the powers so carefully

elaborated by giving the Price Administrator the right to compel a complete overhauling of the established practice of the Commission and the adoption of a new and different standard, when experience had shown that the prevailing practice was adequate to secure the objective of adequate service with a fair rate of return on the utility's investment.

* * *

"Our conclusion is that the refusal of the Commission to undertake such an investigation at this time, and in the meantime to ignore the reasonable needs of the Company, was not arbitrary or illegal, but was well within its lawful discretion." (R. I, pp. 442-443.)

---

The petitioners' brief contains misstatements of facts and is particularly erroneous in its frequent statement that the rate-base developed pursuant to the sliding scale arrangement is undepreciated. We do not deem these statements material to the issues on this appeal; however certain of them are corrected in detail later in this brief, *infra*, page 42 *et seq.*

## SUMMARY OF ARGUMENT

We contend that the petitioners as intervenors and under the Stabilization Act of October 2, 1942 may not properly complain of the action of the Commission in fixing the rates of the Company. The petitioners were not denied a fair and complete participation in the hearing, if they were not authorized to require the Commission to examine anew the rate-base, rate of return and retirement accruals.

The Emergency Price Control Act of 1942 expressly denied any power to regulate public utility rates. (*Davies Warehouse Company* v. *Bowles,* No. 112, this term.) Its amendment, the Stabilization Act of October 2, 1942, did not give petitioners jurisdiction over utility rates, expressly denied them by the Emergency Price Control Act of 1942. This interpretation of the Stabilization Act is dictated by its language and legislative history; and is fortified by the consequences of the interpretation suggested by the petitioners.

The Commission's duty under its own statutes is to fix just and reasonable rates, and this it has done. The Commission was faced with the dilemma of preserving the simple and expeditious method of fixing rates in conformity with the sliding scale arrangement and at the same time giving effect to the war-time economy. This dilemma was resolved by granting a modified rate increase. Neither the Company nor the petitioners were satisfied with the Commission's action, but the rates fixed by the Commission are *presumed* to be "just and reasonable" (*Federal Power Commission et al.* v. *Hope Natural Gas Co.,* Nos. 34 and 35, this term, and the courts should not substitute their judgment for that of the Commission.

## ARGUMENT

*Introductory:* This is essentially a controversy between two administrative bodies with respect to the regulation of public utility rates. The *method* of fixing these rates—not the rates themselves—is primarily at issue.

The Public Utilities Commission of the District of Columbia contends that it has the responsibility for fixing

rates and that it has the discretionary authority to decide what evidence is relevant in proceedings to fix rates and to determine the scope of such proceedings. Its powers and duties are substantially the same as those of public utilities commissions established by the laws of most of the forty-eight states. The petitioners, on the other hand, contend in essence, that, either by the Stabilization Act of October 2, 1942 or by their intervention, the discretion of the Commission as to the method of fixing rates was limited and that the Commission was not entitled to fix rates on the basis of a sliding scale arrangement previously made; although no claim was made that this arrangement should be abrogated or terminated according to its terms, and although the arrangement concededly greatly simplifies rate-making, reduces the cost thereof and eliminates the prolonged delays inevitable in rate-making by the orthodox process.

Petitioners seek to have the Commission's order vacated on the ground that the Company did not show that the increase was "necessary". They seek alternatively to have the case remanded to the Commission on the ground that the Commission did not accord them a fair and complete hearing because it refused to accede to their demands that it investigate anew the rate base, the rate of return and depreciation accruals.

The petitioners, of course, have no standing to complain of the Commission's action unless they are given such standing by the Stabilization Act of October 2, 1942, or by intervening in the proceeding. Thus the threshold question is one of statutory construction as to what powers, if any, were conferred upon the petitioners by that Act respecting the regulation of public utility rates. The second-

ary question is what right, if any, did the petitioners have as intervenors to enlarge the scope of the proceedings and to present issues not raised by the original parties. The third question is whether the Commission acted properly within its statutory powers in conducting the hearings and in fixing rates.

There is no doubt that the petitioners, as the designated agencies of the President, are given some rights by the Stabilization Act of October 2, 1942 in the matter of utility rates where prospective increases in such rates are involved. They are expressly given the right to receive thirty days' notice by the utility, and the utility is also required to consent to their intervention in proceedings before the regulatory agency. If they are permitted to intervene by the regulatory agency, their standing in the case is of course not a "formal" one or a "nominal" one. In this case they were accorded the usual rights of an intervenor (which we discuss, *infra*, pp. 28-31). They properly presented arguments in an attempt to influence the Commission's discretion and they were given the right and were encouraged to present evidence on the inflationary effect, if any, of the proposed rate increase.

It is the position of the Company, however, that neither the Stabilization Act nor the intervention by the petitioners eliminated the plenary power of the Commission in the fixing of public utility rates and that, while the petitioners were free to argue that the Commission should not follow the method of fixing rates provided by the sliding scale arrangement, if the Commission decided nonetheless to adhere to that method of rate-making, the petitioners have no just cause of complaint.

## I

## THE PROPER INTERPRETATION OF THE ACT OF OCTOBER 2, 1942

a. *Intervention.* The petitioners have no standing to question the Commission's actions unless it is given them by the Emergency Price Control Act or its amendment, the Stabilization Act of October 2, 1942, or by their intervention. The Emergency Price Control Act of 1942 expressly denies the Administrator any jurisdiction over the rates of public utilities (Section 302 (c), *infra*, page 57). The only Act, therefore, which the petitioners can claim to give them standing to complain of the action of the Commission is the Stabilization Act of October 2, 1942.

The clearest argument that that Act confers no extraordinary powers on the petitioners is contained in the language of the Act itself. The proviso clause upon which the petitioners rely reads as follows:

> "*Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

A literal interpretation of this language is that the utility must give thirty days' notice of an increase in rates and must consent to intervention by the Director or his representative. This does not give him a *right* to intervene. If Congress had intended to confer such a *right*, it would

have said so in unmistakable language. Thus, in the Act of August 24, 1937 to provide for intervention by the Attorney General of the United States in suits for injunction where there is drawn in question the constitutionality of an Act of the United States (50 Stats. Part I, 751) it is provided that the Court "shall permit" the Attorney General to intervene and to present evidence and to make argument. Here, while the petitioners did not have the *right* to intervene in the proceedings before the Commission, their intervention was permitted by the Commission; but as we show below, it is clear that by such intervention they did not acquire any larger privileges than those of an ordinary intervenor.

b. *Difference between Commodity Prices and Utility Rates.* If the Emergency Price Control Act of 1942 and the amendment thereto, the Stabilization Act of October 2, 1942, be examined it will be evident that the petitioners' arguments, that utility rate increases not "necessary" are outlawed, are untenable. The original price control measure expressly excluded utility rates from the definition of commodity prices (Section 302 (c) *infra* p. 57). It defined "prices" as the sales prices of "commodities" and then specifically provided that "commodities" must not be construed so as to include public utility rates. In the Amendment, the Stabilization Act, the President is authorized to stabilize "prices", and he is authorized also to adjust "prices" to prevent hardships and to render more effective the prosecution of the war. The language is obviously chosen with care. Three words are used, "prices, wages and salaries", all three defined by the original statute itself. Clearly such "prices" refers to prices of commodities which may be stabilized. Since the authorization to "adjust" refers to

prices that may be stabilized it is apparent from the Acts themselves that the standards for increases in prices apply only when prices for such commodities may be stabilized. Utility rates may not be stabilized and the standards prescribed in the Stabilization Act for increasing commodity prices therefore have no applicability.

In Section 2 of the Stabilization Act of October 2, 1942, the President is given the authority to suspend certain provisions concerning the definition of prices in the Emergency Price Control Act, but he is expressly denied the authority to suspend other provisions, among which is included the provision exempting utility rates. The pertinent sentence in the statute is vivid in its precision. It gives the President power to suspend *clause 1* of Section 302 (c) but denies him power to suspend "any other provision"; the utility rate provision is *clause 2* of that Section.

The statement in petitioners' brief (p. 59) that the stabilization program "cannot be confined to commodity prices" but must include utility rates, is in direct conflict with the Emergency Price Control Act itself. That Act covers fully commodity prices but expressly excludes utility rates.

It must be remembered that Congress, in enacting the stabilization laws, was acting with respect not only to the District of Columbia, but to all of the forty-eight States. In giving the Administrator control over *commodity* prices, Congress did not "supervene" State laws, or local regulatory agencies. Commodity prices generally have never been regulated by the States and there are no agencies whose approval is required for an increase. The reasons which prompted Congress to exclude public utilities from the Emergency Price Control Act, "to avoid para-

lyzing or extinguishing local institutions", existed with the same force when the Stabilization Act of October 2, 1942 was enacted. (See *Davies Warehouse Co.* v. *Bowles*, No. 112, this term.)

Unless a ceiling is put on commodity prices, there is no check over them and they may be increased *ad infinitum*, in accordance with the law of supply and demand. Utility rates, on the other hand, have been regulated for years by local regulatory agencies, and they cannot be increased without approval by such agencies. There is, therefore, a clear distinction between utility rates and the "function of a stabilization program" to stop rises in prices which result "when shortages in supply coincide with intense demand" (Pet. Br., p. 59). The reasons for stabilization do not apply to the utility industry, where prices have little or nothing to do with supply and demand (see Pet. Br., p. 57, *et seq.*). Thus, from the petitioners' own view of the purposes of the stabilization laws, there is no need for their application to the utility industry. Congress had this distinction clearly in mind when it expressly excluded utility rates from the Emergency Price Control Act of 1942 (*Davies Warehouse Co.* v. *Bowles*, No. 112, *supra*). It could not have overlooked this distinction when it required only notice, and a consent by the utility to intervention, in the Amendment of October 2, 1942. This was also the opinion of Mr. Henderson, former Price Administrator.*

*At the hearing in which the Bill later enacted as the Emergency Price Control Act of 1942, was under consideration, Mr. Henderson said:

> "Now, as to the utilities. There is, as members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations, and of State laws. It seemed to those draft-

This Court has recently discussed this very question (*Davies Warehouse Co.* v. *Bowles, supra*):

> "Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not."
>
> "Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation."

c. *Legislative History.* The legislative history of the Stabilization Act of October 2, 1942, confirms the fact that no extraordinary rights were intended to be given the Director. When the Bill was under consideration in the Senate, Senator Norris introduced an amendment forbidding increases in utility rates, unless such increases were approved by the President. This amendment passed the Senate but was rejected at the conference between conferees of the House and the Senate, and the provision requiring only notice and consent by the utility to interven-

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ing the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill."

(Hearings before House Committee on Banking and Currency—pages 54 and 55, August 6, 1941, H.R. 5479.)

tion (as subsequently enacted) was substituted (88 Cong. Record, pp. 7443, 7877-7878).

The Chairman of the Committee in charge of the bill in the Senate stated in respect to the substitution:

> "* * * the House conferees * * * were unwilling to accept the Senate amendment. They were unanimous in their views; and it was impossible for us to persuade them to accept the Norris amendment" (88 Cong. Record, p. 7971).

Senator Bone assumed that:

> "* * * though the President's representative would be technically a party in an appeal, he would merely have the right formally to present his views, or the views of the administration, to the regulatory body, but he would have nothing to say about its decision", (88 Cong. Record, p. 7974).

and Senator Norris said:

> "What has been substituted by the Conference Committee for the original language agreed to by the Senate does not, technically, afford any relief whatever, although, morally, I think it will result in considerable relief.
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> * * * * * * *
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> "When the President's representative appears before a tribunal having jurisdiction to fix or increase utility rates, he could say—and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation. * * * We are all anxious to get through with this measure, and I think we should all be willing to sacrifice something we believe ought to be in the measure in order to

> have it finally passed. For that reason I do not believe we are justified in rejecting the conference report simply because in some particular it has not met completely with our ideas" (88 Cong. Record, p. 7974).

In view of these statements it is difficult to understand how the petitioners can now contend that the proviso clause as enacted accomplishes what Senator Norris hoped to accomplish through his proposed amendent which was rejected.

True, Senator Norris was "disappointed" at the rejection, but it cannot be assumed, as the petitioners suggest, that he did not know what he was talking about. When discussing the substitute provision on the Senate floor, he said that intervention would have a "moral effect". As the petitioners point out (Br. p. 76) when Senator Norris assumed that the President's representative would have no right to appeal, "Senator Brown promptly corrected this misconception". Clearly Senator Brown would have been equally prompt to have corrected a misconception of Senator Norris on the standing of the President's representative before the Commission.*

d. *The rights given to Petitioners by the Stabilization Act, after intervention, in proceedings before Regulatory Agencies for increase in utility rates.* The question naturally arises what position the President's representative has in the proceeding, once intervention has been granted to him. This question is partially answered by the petitioners' brief. They say (pp. 59, 60):

> "Some prices, some wages, and some rates must be allowed to increase, in the interest of obtaining

*The pertinent statements in the Senate discussing this particular question are set out in full in the appendix, *infra*, pp. 61-64.

> essential production. Failure to relieve such pressures may mean a loss in total national production or losses in certain fields which are important to the war effort."

Also (pp. 26, 27):

> "Not all rate increases are opposed by petitioners, or should be. If, without exception, rate increases were injurious to the national economy, no doubt Congress would have prohibited them flatly, but, just as Congress gave the President authority to authorize necessary adjustments in prices, wages, and salaries above September 15, 1942, levels, and just as the Senate proviso would have extended his authority to utility rate increases, so the intervention procedure supposes an increase in some utility rates above the September 15, 1942, level."

Thus, in the petitioners' own words, all rate increases are not inflationary and do not conflict with the Stabilization Act. What rate increases *are* inflationary and *do* conflict with the Stabilization Act? Obviously this question cannot be answered unless the regulatory agency knows what the national stabilization program is. The petitioners say (Br. p. 28):

> "Whatever the standards which may be formulated to govern rate increases under a wartime stabilization program, it is clear that they cannot exclude as irrelevant the true earnings and return realized by the utility."

According to this statement there are two evidentiary matters to be looked into. One is the "wartime stabilization program" and the other is "the true earnings and return realized by the utility". The earnings and return are mat-

ters with which the Commission is peculiarly competent to deal without assistance from the petitioners. The wartime stabilization program is a matter of which the Commission knows little, and on which evidence and assistance from the petitioners would be of value, and was repeatedly requested by the Commission during the hearings.

Local regulatory agencies, such as the Commission in this case, must be presumed to know or have access to the facts in regard to the utility whose rates are in question. They must also be presumed to know conditions under which the Company is operating. They do not need the President's representative to introduce evidence for their use and inform them on these matters. This is primarily the function of the Commission's staff. They do not know, however, the economic program of the Federal Government or whether and to what exent, if any, the proposed increases in rates are in conflict with the national economic program. It is here that the Federal agency can assist them.

That Congress did not intend to supersede the State laws for the regulation of public utilities is clear from the Act itself, but in addition this Court has said unequivocally that such an intent cannot be ascribed to Congress:

> "In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress *did not intend*, and certainly has given no clear indication that it did intend, *to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility.*" (*Davies Warehouse Co.* v. *Bowles, supra.*) (Italics supplied.)

This being the intent of Congress in enacting the Stabilization Act, the petitioners would be authorized to present evidence, not on the ingredients of rate-making, but on the subject of the national price stabilization program and the effect *thereon* of the proposed increase. This is, after all, an important function; its importance is demonstrated by the weight accorded it by the Commission in this case, in diminishing the amount of the increase to about two-thirds of the amount shown by its own staff to be due.

e. *The Issue—Control over the Proceedings.* The petitioners say (Br. p. 25) that the Commission was required "to accept and consider relevant evidence proffered by them and, so far as practicable, to determine all substantial issues raised by them relating to the utility's claim to an increased rate". This statement, it should be noted, is qualified by the word "relevant". Who is to determine whether the proffered evidence is "relevant" or not? Here the Commission decided that evidence concerning the rate-base, the rate of return and depreciation was not relevant. The petitioners contended otherwise.

If the relevance of the evidence is to be decided by the petitioners and if the Commission is under a duty to accept and consider such evidence, then the petitioners necessarily have been given the power to control the method to be used in establishing the rates of utility companies. For example, the theory of allocation of property between service within and service without the District of Columbia followed by the Commission for years has been that of the gas actually used. If the petitioners contend that the allocation should be on the basis of revenue, such evidence would have to be received and considered by the Commission. Similarly, in Massachusetts the theory consistently followed by the State

Commission for a number of years has been to determine the prudent investment in the company and to fix rates accordingly. If the petitioners are authorized by the Stabilization Act to compel the Massachusetts Commission to "accept and consider" evidence on the "fair value" of the utility, such determination either would be of no use to the Commission or it would violate the principles the Commission has followed.

If a Commission is compelled to "accept and consider" evidence on any question that the *petitioners* believe relevant the Commission must hear and consider evidence, if it is tendered by the petitioners, on questions such as the price paid by the company for its raw materials, salaries paid by it to its officers and other matters purely within the domain of management.

If the Commission made an investigation of the rate base and of the rate of return, as urged by the petitioners, the probable result would have been an abrogation of the sliding scale plan and a return to the great expense and delay incident to orthodox rate regulation, which has been frequently the subject of criticism*. Nothing could be more

*For example, Mr. Justice Brandeis stated in his concurring opinion in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 88, 93 (1936):

> "* * * The greater delay, and the cost, in rate investigations affecting the larger utilities, is illustrated by cases which have come before this Court in recent years.
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> * * * * *
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> "Surely, all must agree with the Secretary of Agriculture that: 'If rate regulation is to be effective, there must come at some time an end of hearings and a decision of the questions involved.' In *Chicago, Burlington & Quincy Ry.* v. *Babcock*, 204 U. S. 585, 598, we said of valuations made by the State Board of Equalization and Assessment: 'Within its jurisdiction, except as we have said, in the

discouraging to regulatory body which had designed an expeditious and fair method of rate-making for the purpose of avoiding this criticism and defect.

As we have said before, in enacting the Stabilization Act, Congress was not passing legislation intended for the District of Columbia alone. It passed a law affecting prices throughout the country and did not intend to amend, supersede or interfere with the utility regulatory laws of the various States or the District of Columbia. *Davies Warehouse Co.* v. *Bowles, supra.*

f. *Conclusion.* We are concerned here not with what Congress might have done nor what the petitioners wish

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case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end.' Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise."

In *McCart et al.* v. *Indianapolis Water Co.*, 302 U. S. 419 (1938), Mr. Justice Black, dissenting, also points out the circuitous and lengthy trail of such litigation, starting at p. 423 and stating:

"In the delays incident to rate litigation it is probably true that prices will fluctuate many times between the beginning of a litigation and the time when the cause is won, lost or abandoned.

"It has now been more than five years since the commission fixed a valuation for this water works property

Congress had done, *but with what Congress intended by enacting the Stabilization Act.* The fact is that Congress did not intend the Stabilization Act of October 2, 1942 to confer any extraordinary power over utility rates upon the petitioners. This conclusion is further strengthened by arguments which the petitioners themselves make. They say that Senator Norris was "disappointed" over the substitution in conference of the proviso clause as enacted for his proposed amendment giving the President a "veto" over utility increases, and that his remarks were in "disparagement" of the substitute (Br. p. 75). What reason did

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and it has been more than four years since the master reached his conclusion. If it requires four more years for this case to return to the Court of Appeals, there can be no doubt but that some price index can be found to show other changes in prices. Such a result will add still further to the confusion and chaos of judicial rate making. I believe it forecasts a day when the present long delays in rate regulation will be endless.

"The City of Indianapolis should not be subjected to another trial unless this Court believes the rates to be confiscatory (pp. 426-7).

* * * * *

"I believe this cause should be brought to a conclusion at this time. * * * See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 16; also *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 420 (p. 427).

* * * * *

"This case is an illustration of the almost insuperable obstacles to rate regulation today. It involves a single Company supplying water to a single community. It does not present the difficulties of a far-flung utility system covering much territory with many separate corporate creatures. Nevertheless, this particular case has already consumed more than six years and is apparently destined to remain suspended for six more years. More than 2000 pages of records and exhibits appear in this Court in the appeal" (p. 435).

Senator Norris have to be disappointed if the change was of no "relevance", as petitioners contend? The petitioners also argue that the Stabilization Act "imposed a duty on regulatory authorities" (Br. p. 75), and that this "duty" was to approve no rate increases which were not "necessary". If this is so, what need for intervention by the President's representative? The intervention, in such case, then in truth would be only "nominal" or "formal".

Congress meant that when an increase in utility rates is proposed in wartime, the petitioners must be notified so that they may seek the opportunity to explain to the regulatory authority the nature, extent, exceptions, intricacies, purposes and effects of the national stabilization program. That responsibility is a task of substance, not a mere formality.

## II

## THE PETITIONERS AS INTERVENORS CANNOT ENLARGE THE ISSUES AT THE HEARING AND THEY WERE AFFORDED A FAIR AND COMPLETE HEARING BY THE COMMISSION.

a. *The position of an intervenor.* Petitioners contend that the position of intervenors in the proceedings both before and after the enactment of the Stabilization Act of October 2, 1942, entitled them to broaden the scope of the proceedings and to examine in detail the elements of the sliding scale arrangement itself.

An intervenor is not entitled to such privileges as a matter of right.

In *Chandler Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 58, 59 (1935), the court stated:

> "Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties.
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> * * * * * *
>
> "Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill."

In *United States* v. *Northern Securities Co., et al.*, 128 F. 808, 813 (1904), the court stated:

> "Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried."

The Stabilization Act of October 2, 1942 does not require that the Commission must permit intervention by the designated agencies of the President. It only specifies that the utility must consent to intervention. If Congress had intended the intervention to be mandatory, it would have said so clearly, as it has in other cases. (See p. 16, *supra*.) Even if the Commission were compelled to permit intervention, that intervention would still be allowed upon such terms as the Commission deemed proper, as there is no statutory definition of the scope of intervention in the Stabilization Act. In such a situation the intervenor has no right to enlarge the issues.

> "It has been a rather rigid rule that the range of activity of an intervener in the prosecution or defense of the interest he is permitted to assert is necessarily as extensive as, but no greater than, that

allowed the original parties to the suit, that the intervention does not enlarge the scope or vary the nature of the litigation, nor will the court permit the intervener to file a pleading which would have that effect." (Cyclopedia of Federal Procedure, 2nd. ed., 1943, Vol. 6, Sec. 2405.)

From the outset the Commission restricted the proceedings to the operation of the sliding scale arrangement. Its orders of March 20, 1942 and July 21, 1942 specified that the investigation and hearings should be in conformity or in accordance with the sliding scale arrangement (R. I, 33-34).

Congress has given the Commission the authority to make rules and regulations covering its practice and procedure (D. C. Code Section 43-202). Pursuant to this authority the Commission enacted its Rule 7.5 which is as follows:

> "RULE 7.5. *Effect on Issues.* The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

This rule was in effect at the time of the petitioners' interventions and must be regarded as binding on them unless the rule was superseded or abrogated by the Stabilization Act of October 2, 1942. This, as we have shown, was not the case. The Commission rules also provide for a limited intervention. Rule 7.3 states:

> "The Commission may grant or deny a petition for leave to intervene, or may grant the petition

upon such conditions and limitations as it may prescribe."

Pursuant to this rule, the Commission, by its Order No. 2404 (R. I, 60-63) properly granted intervention to petitioners for the purpose of receiving from them "additional evidence relating to the inflationary effect, if any, of the increase in rates * * *."

Thus under the law and the Commission's own orders and its rules regulating procedure and practice before it the intervenors were not authorized to expand the issues.

b. *The petitioners were afforded a fair and complete hearing.* It is reasonable to suppose that Congress intended "an intervention of the usual character". (Opinion of Justice Miller, below.) As we have shown, Congress, by the Stabilization Act of October 2, 1942, had in mind a permissive intervention and not an intervention as of right. When the petitioners, after intervention, sought to enlarge the issues and have the Commission investigate the rate-base, rate of return and retirement accruals, they were seeking to introduce in the hearings issues not theretofore raised and not contemplated by the Commission. They were thus seeking more than "an intervention of the usual character." Unless they were authorized to compel the Commission to examine these matters, by the Stabilization Act of October 2, 1942, they were not denied a fair and complete hearing. The Stabilization Act of October 2, 1942 did not confer any such right, as we have demonstrated in POINT I above. A refusal to undertake an investigation which the intervenors have no right to demand, is not a denial of a fair and complete hearing.

## III

## THE DUTY OF THE COMMISSION TO FIX JUST AND REASONABLE RATES

It should again be noted that the petitioners do not complain of the rates but only of the procedure in which they were made. In other words, it is primarily the *method* not the *rates* which are objected to.

a. *The duty of the Commission under its own statutes.* It is the duty of the Commission to fix just and reasonable rates (D. C. Code, Section 43-301). This duty is not affected by the fact that the sliding scale arrangement is in effect (D. C. Code, Section 43-317). The Commission and it alone has been entrusted by Congress with the responsibility of regulating utilities within the District of Columbia. Its judgment as to whether or not a rate increase is necessary must be respected.*

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*The making of rates is an extremely complicated matter requiring, as it does, a balancing of the interest of the investors and the consumers. Professor Bonbright says (Bonbright *Valuation of Property*, Volume II, p. 1089):

> "Even the most enthusiastic supporter of any one form of prudent investment or of replacement cost must recognize that the advantages do not all lie with his own choice. The intelligent defender of the prudent-investment rate base, for example, well knows that in some respects it is decidedly inferior to a replacement-cost rate base, and that in other respects it is inferior to a scheme of rate making which disregards entirely the test of a reasonable return on any rate base of any description. The choice depends on a balancing of the relative merits and demerits of the alternative schemes. This necessity of weighing the good against the evil is all the more obvious because of the conflict of interests between various classes of people who

This Court has consistently refused to substitute its judgment for that of a commission on such matters. *Board of Trade* v. *United States,* 314 U. S. 534, 548 (1942), is relevant:

> "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."

In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224 (1943), this Court refused to set aside regulations of the Federal Communications Commission concerning chain broadcasting. After quoting from the *Board of Trade* case, *supra,* the Court continued:

> "* * * Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise."

In the concurring opinion of Justices Black, Douglas and Murphy in *Federal Power Commission et al.* v. *Natural Gas Pipeline Co. et al.,* 315 U. S. 575, 608 (1942), it was said:

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are materially affected by public-utility rates. Not only is there a division of interests between investors and consumers, but there are perhaps even more important divisions between different classes of investors and between different classes of consumers. Merely to illustrate these divisions, one may note that the prudent-investment principle is conceded, even by some of its enemies, to be in the interest of bondholders and of preferred stockholders, although it is alleged to be detrimental to the interests of common stockholders."

> ". . . the problem of rate-making is for the administrative experts, not the courts, and that the *ex post facto* function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of orders of other administrative agencies."

b. *The duty of the Commission under the Stabilization Act of October 2, 1942.* Since the rates objected to by petitioners are established by the Commission, it is to be presumed that such rates are just and reasonable. See *Federal Power Commission* v. *Hope Natural Gas Co., supra.* This presumption of validity is conclusive unless, under the Stabilization Act, an approved increase in rates is not just and reasonable if it is not "necessary", or unless that Act nullifies the Commission's duty to fix just and reasonable rates. It is difficult to determine from the petitioners' brief what they contend in this regard (see Br. pp. 67 *et seq.* and 73 *et seq.*). Whatever their contention, neither interpretation of the Act can be sustained, as we show in Point I above. Petitioners contend that the Stabilization Act "imposed a duty on regulatory authorities" (Br. p. 75). If this be so, Congress has passed an act "which precludes the execution of state laws by state authority in a matter normally within state power". This Court has said that it would be reluctant to place such an interpretation on a statute. If Congress had meant to do this, "it would not have been at a loss for words to say so" (*Davies Warehouse Co.* v. *Bowles, supra*).

The truth is the petitioners would have the Stabilization Act construed to prevent any rate increase for utilities ex-

cept where circumstances are such that an increase in commodity prices would be permitted.* This is as much as admitted in petitioners' brief (p. 17) where they say "It is of no relevance that the President was not given the power to suspend the exemption of public utility rates * * *".

Under this view the rejection of the Norris amendment in conference was of no significance. The Norris amendment was designed to confer upon the President the right to veto rate increases. Petitioners say that the substitute proviso imposes the duty to veto rate increases upon regulatory agencies. Thus they say that the rejection of the Norris amendment merely shifted the duty from a Federal agency to a State agency, but the *duty* would be the same in either case.

Under the contention of the petitioners, the function of the Commission here and of the commissions in all States, to fix "just and reasonable" rates would be at an end. What matters the rate-base if rates can only be increased to prevent "hardship"? What does it matter whether the rate of return is 4% or 6%? How can it possibly matter whether a sinking fund for a depreciation reserve carries interest at 4% or 6%? These are problems which though

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*This state of mind of petitioners is exemplified by the statement (Br. p. 23) that the rejected Norris amendment was to prevent * * * "the difficulties which the Administrator had been experiencing as intervenor before the Public Utilities Commission of the District of Columbia in this very case". They then say (Br. p. 24): "It cannot be supposed that, in a measure originally designed to put an end to such difficulties, the Congress in actuality merely perpetuated them". The short and simple answer is that the "measure originally designed to put an end to such difficulties" was not enacted by Congress, but was stricken out of the bill as passed.

raised by the petitioners here, are wholly immaterial if a rate increase can only be granted to prevent hardship. The only material questions on whether a rate increase is necessary to prevent hardship are inquiries as to the expenses, the revenues and the amounts necessary for interest and dividends; questions which have no necessary connection with rate-base or rate of return.

c. *The Commission Found the Increase to Be Necessary for the War Effort.* As a matter of fact, all the discussion in petitioners' brief about the requirements imposed by the price control legislation upon regulatory authorities is wholly beside the point in the case at bar because the Commission *found* the rate increase to be "necessary". We can assume *arguendo* that the Stabilization Act of October 2, 1942 proscribes a rate increase unless such increase is "necessary". The petitioners introduced no evidence whatsoever on the questions of whether the rate increase was necessary to prevent "hardship" or for the effective prosecution of the war but the Commission found nonetheless that such was the case.

The Commission said (R. I, pp. 50-51) that:

> "There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of expanding its plant to meet the growing demands for gas service. We must weigh the necessity for an increase in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The Dis-

trict of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service.

* * * * *

"After careful consideration of all factors having a bearing on this case, including the fact that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding scale arrangement, we are of the opinion that, after making the adjustments hereinbefore approved, the amount available for increase in rates under the sliding scale arrangement for the rate year beginning September 1, 1942 is $201,424.74" (R. I, 50-51).

*Thus the Commission itself found that the increase was necessary.* Not only so, but it assigned two vital reasons for its action, namely, the financial position of the Company and the problem of adequate service. Certainly the Commission was not bound to accept the petitioners' judgment as to whether the rate increase was or was not necessary. Nor will this Court substitute its judgment for the Commission's on this question. Here is the nub of the controversy: If the appropriate regulatory authority finds a rate increase necessary because of the financial position of the Company and the vital necessity for adequate service in a war area, can the Director, the Administrator or the Court decree otherwise?

## IV

## THE COMMISSION ACTED PROPERLY WITHIN ITS DISCRETION UNDER THE STATUTES OF CONGRESS AUTHORIZING IT TO REGULATE UTILITIES WITHIN THE DISTRICT OF COLUMBIA

The Commission's action is presumed to be valid. *Federal Power Commission et al* v. *Hope Natural Gas Co., supra.* The findings of fact by the Commission are conclusive unless "unreasonable, arbitrary or capricious" (D. C. Code, Section 43-706). Thus a presumption of validity is attached to the rates it prescribes and its findings are conclusive so that its action is unassailable unless it acted unreasonably, arbitrarily or capriciously. Let us examine the Commission's actions.

a. *Background of the Sliding Scale.* No clear conception of the problems which confronted the Commission can be had unless the historical background leading up to the establishment of the sliding scale arrangement is understood.

Under the law creating the Public Utilities Commission of the District of Columbia, the Commission is charged with the duty (D. C. Code, Section 43-305) of ascertaining with respect to each public utility within its jurisdiction the original cost of the property, and the reproduction or replacement cost of that property. The Commission is also charged (D. C. Code, Section 43-306) with the duty of valuing the property of each public utility at the fair value thereof at the time of valuation.

In pursuance of these duties, the Commission, under date of September 25, 1931, by its Orders No. 947 and No.

948, instituted a valuation proceeding for the purpose of determining the values of the properties of the Washington Gas Light Company and of its wholly owned subsidiary, The Georgetown Gaslight Company, which two companies in their operations covered the District of Columbia. The proceedings with respect to the two companies were concurrent, and for the purpose of this brief we treat the two companies as one, under the appellation "the Company".

Thereupon the staff of the Commission, and the engineers employed by the Company, commenced a detailed inventory and valuation of the property of the Company, both groups preparing appraisals of reproduction cost new and of original cost, and also of depreciation. After the inventory was well under way, it was agreed that the valuation date should be June 30, 1932. During the period of preparation of the inventory and appraisals, it was suggested by the Chairman of the Commission that controversial issues which might develop at the hearings could be considerably limited if the engineers and accountants representing the Company and the Commission, respectively, were to engage in conferences to ascertain on what matters of fact they were in agreement and on what matters, in disagreement. These conferences commenced early in March of 1933 and continued through the spring and summer of that year.

Public hearings were begun on April 30, 1933. The Company's case in chief was closed on January 29, 1934, and the Commission's case in chief was closed on June 23, 1934. Testimony was finally closed on June 26, 1934. The record of the case consisted of nearly 7,500 pages of written testimony and 148 exhibits, comprising over 8,000 pages, making the aggregate record well over 15,000 pages. Elabo-

rate briefs were submitted by counsel for the Company and by People's counsel early in August, 1934.

Under date of March 19, 1935, the Commission handed down its valuation Orders Nos. 1341 and 1342, in which it determined the valuation of the properties of the Company. No separate allowance was made for going concern value, and the Commission reached the conclusion that the value of the property as of June 30, 1932 was $16,993,000 after deducting $3,037,000 for depreciation. The sum of $822,000 as the amount of working capital was included in the valuation. Thus the value of the properties of the Company, excluding working capital and after deducting depreciation, was determined to be approximately $16,170,000. (Tr. II, 238, 255).

On the subject of original cost, complete appraisals were submitted both by the Company experts and the experts of the Commission, and hundreds of pages of exhibits and testimony on this subject were included in the record. However, the Commission found (Order No. 1341, p. 81; Tr. II, 208):

> "* * * the actual original cost of the properties cannot be determined. Many of the early records are missing and in general, prior to 1915, in the case of structures and equipment, and prior to 1910, in case of the distribution system, the records which are available were not accurately kept."

It should be borne in mind that the Company had been in existence since July 8, 1848.

The Company filed appeals from the valuation orders under the provisions of paragraph 64 of the Law Creating the Public Utilities Commission (37 Stats. 974), which specifically provided that a public utility dissatisfied with

the valuation order might bring a suit to vacate or set aside the order in the Supreme Court of the District of Columbia. While this appeal was pending, and on August 27, 1935, Congress enacted a statute (49 Stats. 882) amending paragraph 64 to eliminate the right of appeal from valuation orders of the Commission; in 1936 after the sliding scale arrangement was established, these appeals were dismissed.

Shortly after the valuation orders were handed down, hearings for the fixing of rates were begun, which culminated in Order No. 1458 of the Commission dated December 13, 1935 (Tr. II, p. 256), and which prescribed the sliding scale arrangement for the fixing of rates of the Company. The rate proceedings were begun on June 3, 1935 and continued through October 31, 1935, when they were interrupted by the negotiations leading up to the sliding scale arrangement. At the time the rate proceedings were adjourned, the transcript of the oral testimony in that case consisted of more than 5,200 pages, and 113 exhibits had been received in evidence.

During the rate proceedings the valuation of the property was adjusted by adding net additions at cost up to June 30, 1935, and consideration was given to increased value due to change in price levels subsequent to June 30, 1932. The result was, according to the Company's computation and using the valuation figures determined by the Commission in its Orders Nos. 1341 and 1342, that the June 30, 1935 value of the properties of the Company was approximately $24,306,191 before depreciation. This figure, or a similar figure, was modified by excluding working capital and by deducting depreciation, and the agreed rate-base, fixed in the sliding scale arrangement, of $21,000,000, was the result. (See also *infra*, p. 43.)

b. *Misstatement of Fundamental Facts in Petitioners' Brief.* Great stress is laid in petitioners' brief on their unsupported assumption that the sliding scale rate-base was *an undepreciated rate-base* (petitioners' brief, footnote bottom of pp. 9 and 10; and pp. 3, 9, 16, 18, 37, 45, 80, 87 and 96).

Particular emphasis is made on page 9 of petitioners' brief, where they say:

> "On March 19, 1935, the Commission entered an order fixing $15,039,000 as the fair value of the *undepreciated property of the company as of June 30, 1935.*" (Italics supplied).

This statement is incorrect in three respects:

1. The figure used omitted The Georgetown Gaslight Company property. It should have been $16,993,000.
2. This amount of fair value was arrived at after deducting depreciation in the amount of $3,000,000.
3. The valuation date was June 30, 1932 (not June 30, 1935).

Only a very hasty reading of the Orders of March 19, 1935 would excuse the statement that the valuation made no provision for depreciation, as the detailed method of arriving at the valuation is fully set forth in the Orders. In Order No. 1341 (Tr. II, 124) relating to the Washington Gas Light Company alone, reproduction cost new of property other than land was found to be $15,550,000. From this was subtracted the finding of depreciation of $2,855,000 leaving $12,695,000. To this figure was added the value found for land, viz. $1,654,846, making a total of $14,349,846. To this was added $689,000 working capital, making a

total value, after deducting depreciation, of $15,038,846, which was rounded off by the Commission (p. 111, Order No. 1341) to $15,039,000. In Order No. 1342 (Tr. II, 239) relating to The Georgetown Gaslight Company alone, reproduction cost new of property other than land was found to be $1,845,000. From this was subtracted the finding of depreciation of $182,127, leaving $1,662,873. To this figure was added the value found for land, viz. $158,120, making a total of $1,820,993. To this was added $133,000 working capital, making a total value, after deducting depreciation, of $1,953,993, which was rounded off by the Commission (p. 16, Order No. 1342) to $1,954,000. This finding, when added to the finding for Washington Gas Light Company, results in a finding of value, after deducting depreciation, of $16,993,000 as of June 30, 1932.

Not only did the valuation orders of the Commission contain a deduction for depreciation, but the rate-base of $21,000,000 stipulated in the sliding scale arrangement (Tr. II, 260) was arrived at after the deduction of depreciation.

On November 18, 1935, the then Corporation Counsel and the Special Assistant Corporation Counsel for Public Utilities addressed a memorandum to the Public Utilities Commission regarding the proposed sliding scale arrangement. Paragraph numbered (1) of that memorandum reads in part as follows:

> "The rate base stated ($21,000,000. plus working capital) may be predicated upon the testimony of the Commission's own staff as such testimony appears in the record. The Commission's witness Scantlin's estimate of reproduction cost is $20,950,000. His deduction for depreciation is about $4,000,000. and the Companies' deduction is $1,000,000. If depreciation of (in round figures)

$3,000,000. as found by the Commission in the valuation case, be deducted, the figure becomes $17,950,000. To this must be added land at approximately $2,000,000., net additions and betterments between December 31, 1934, and June 30, 1935, of about $250,000., and the cost of the Prince George's Gas Corporation's property of $840,000. The total of these figures is $21,040,000."

c. *Problem Confronting the Commission.* Let us now consider the problem which confronted the Commission when, in the case now at bar, it embarked upon the annual determination of rates in August, 1942.

The proceeding at the start was a routine one and the order calling the hearing was the usual order. It provided (R. I, 34) that the Commission would hold a formal hearing on August 18, 1942 relative to the rates of the Company, to become effective September 1, 1942 "in accordance with the sliding scale arrangement established by Order No. 1458".

The sliding scale arrangement with the Company had been in effect since 1935. It had been arrived at at the end of a tedious and costly investigation which had been going on since 1931. It had been adopted after extensive public hearings and had been praised* as a means of avoiding the very type of proceeding which had just been concluded, and it was designed to keep the rates of the

*See the following articles in *Public Utilities Fortnightly*: April 27, 1933—p. 506, "How the Sliding Scale Basis of Rate-Making Works" by Mason M. Patrick; April 23, 1936—p. 531, "How Better Utility Regulation Can Be Achieved" by Riley E. Elgen; July 2, 1936—p. 11, "How the 'Sliding Scale' Reduced Rates" by William A. Roberts.

Company up to date in a fair and expeditious manner. While the Company's rates were regulated more closely and more frequently than by periodic rate proceedings under the orthodox method, the sliding scale arrangement was valuable both to the Company and to the Commission as providing a fixed and certain method of determining the charges to the consumer and, in effect, giving the consumer a closer and more timely interest in the welfare of the Company, in that in good times both the Company and the consumer benefited and in times of stress the Company and the consumer participated through the raising of rates.

All this the Commission knew. It also knew, through its supervision over the financing of the Company, that in prospectuses connected with the issuance by the Company of its bonds and preferred stock since the sliding scale arrangement had become effective, that arrangement had been described in detail to the investor, and that the investor must, to some extent at least, have relied upon the integrity of the sliding scale arrangement in purchasing these securities. The Commission was also aware of the skepticism in utility circles with respect to the sliding scale arrangement, commonly known as "the Washington plan", and of the cynical predictions that it would be allowed to work only so long as it provided an expeditious method of reducing rates, but would be scrapped the moment it indicated an increase in rates.* The Commission, or a majority of it, was aware of the background of the sliding scale. Also its counsel, the Corporation Counsel for the District of

*See the following articles in *Public Utilities Fortnightly:* March 30, 1933—p. 390, "A Regulatory Experiment" by Aaron Hardy Ulm; September 10, 1942—p. 373, "The Washington Plan Trembles in the Balance by Francis X. Welch.

Columbia, had participated actively in the valuation and rate proceedings leading up to the establishment of the sliding scale, first as People's Counsel and then as a member and vice-chairman of the Commission. As Corporation Counsel he also participated in the hearings in the fall of 1942.

The Commission realized that after weeks and months of hearings and investigation it had come to the conclusion in 1935 that the original cost of the property of the Company could not be found, but that the sliding scale had established a rate-base far less than that testified to by the experts of the Company; that to the extent that this rate-base might differ from original cost it constantly approached that cost as old properties were retired and new properties were added to the rate-base at their cost, and that the rate base had increased from the original amount of $21,000,000 to approximately $30,700,000 on June 30, 1942. It must be presumed that the Commission was thoroughly aware of its duties to fix just and reasonable rates under the statute, and every evidence was given of the consciousness of this duty throughout the hearings and in the opinion and order of the Commission.

The national policy to hold down the cost of living was brought forcibly to its attention by the Office of Price Administration at the pre-hearing conference before the hearings began. With this background in mind, let us examine what the Commission did.

d. *Proceedings of the Commission.* Its first step was to permit the Administrator to intervene in the proceedings and from then on until the close of the hearings, on Sep-

tember 30, 1942, it steadfastly refused to permit counsel for the Office of Price Administration to take control of the proceedings by enlarging the scope thereof.

Perhaps the best statement of the position of the Commission throughout these proceedings is contained in the statement of Chairman Flanagan (R. I, 122, 123), which we quote in part as follows:

> "This Commission in effect has already ruled that questions pertaining to basic elements of the sliding scale arrangement described in Order No. 1458, dated December 13, 1935, are not within the scope of the present proceeding. This proceeding is vastly different from a proceeding involving a rate case as that term is generally understood. Rate cases usually involve a tremendous amount of investigatory work, detailed analyses, and a complete review of the operations of the utility involved, sometimes over a period of years. The question of the detailed valuation of property also must be determined in such a rate case. Here all that work was done before the existing sliding scale arrangement was entered into. In every year in which the arrangement has been in effect the staff of this Commission has spent months in making detailed audit of the company's operations. To question a basic element of the arrangement at this time would undoubtedly result in throwing open all other elements of the arrangement for reconsideration. This would obviously lead to protracted negotiations, and the question as to whether another arrangement would be more advantageous or less advantageous to the consumer could not be settled within a period of months. It was not the intention of the Commission to initiate such proceedings when it called these hearings for the purpose of conducting its usual

annual investigation of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company under the sliding scale arrangement.

"This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding. However, we do not feel that the presentation of such views requires that the Office of Price Administration should carry on a detailed investigation into the accounts of the gas company. This has already been done by our staff, which is competent and experienced. It is the duty of this Commission to determine whether the accounting of the company has been performed in accordance with the terms of the sliding scale arrangement. We have the further duty of determining that items entering into the computations made under that arrangement are reasonable."

The position of the Counsel for the Office of Price Administration is made clear from the quotation from his statement (R. I, 206, 207):

"The position we must insist upon is that if we as the agent designated by the Director of Economic Stabilization are to comply with the obligations imposed upon us in utility rate proceedings, there must be no strings or restrictions attached to our ability to make an adequate showing that the rates of the Washington Gas Light Company should be no higher than charged by the Company to its customers on September 15. We must be given the right to examine every issue which the courts have

held enters into the making of fair and reasonable rate regardless of the terms of sliding-scale arrangement or previous conclusions by the Commission that a rate increase is justified. If we are to comply with applicable judicial principles affecting the question of fair and reasonable rates, we must have the right to go into at least the following factors:

> "(1) What is a proper rate base? And on that point an inquiry should be made and promptly as to why the rate base should not be predicated upon the original cost of the Company property. Why should the rate payers be compelled to pay increased rates upon a rate base largely in excess of the original cost of the Company's property?
>
> "(2) What are fair operating expenses of the company? Here the question of depreciation expense is a serious problem as far as the public is concerned since accrued depreciation was not deducted from the rate base.
>
> "(3) What are other proper operating expenses? Here the minority opinion by Commissioner Hankin must be given fair and adequate consideration.
>
> "(4) What are proper income taxes to be allowed or should the Company's customers pay its war taxes?.
>
> "(5) What is a fair rate of return for this Company in the light of current economic conditions?"

We doubt whether any clearer statement as to the issues between these two administrative bodies can be made. The

Commission was apprehensive lest the sliding scale be destroyed and the consumers of gas suffer by a return to the tedious and costly delays of orthodox rate making. Such a method, as we have shown, is costly to consumers both in the delays incident to rate decreases and the expense of regulation which, as the Court knows, is properly charged to operating expenses. While the return to orthodox rate-making might have been of temporary benefit to the consumers by indefinitely delaying an increase in rates, it would in the final analysis have been more costly to them and would have effectively scrapped the method which had been designed to avoid these delays and cost. (See the opinion of Mr. Justice Black in *McCart et al.* v. *Indianapolis Water Co., supra,* p. 26.)

The Commission fully realized that the sliding scale arrangement depended upon an agreement or determination with respect to three elements—rate-base, depreciation, and rate of return—and that, like a three-legged stool, no one of these elements could be considered or dealt with without considering and dealing with the others.

e. *Decision of the Commission.* With its background of knowledge and experience, and confronted with this perplexing problem, what was the decision of the Commission?

1. The Commission stated that it was its duty to determine in accordance with the provisions of the sliding scale arrangement whether the Company was entitled to an increase in rates and the amount of such increase, and the Commission stated:

> "This responsibility is so clearcut that to ignore it would constitute an evasion of our duty and would

be a serious reflection upon the ability of this Commission to cope with its problems in a fair and impartial manner." (R. I, 40)

2. The Commission stated that having made this determination it was its duty to give recognition to existing conditions and the bearing of such conditions upon the question before it, and that in addition to giving consideration to present economic conditions, it must consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia.

3. All controversial disallowances and adjustments of operating expenses proposed by the Commission's staff and with respect to which testimony had been adduced at the hearing were resolved in favor of the Commission's staff and against the Company, including the adjustment called for by Section 6 of the sliding scale arrangement, the justification of which required a considerable straining of the language of that part of the sliding scale arrangement.

4. In addition, the Commission declined to permit the inclusion in operating expenses of certain taxes, although this had been the practice in the past under the express stipulation of the sliding scale arrangement, and thus it eliminated entirely excess profits taxes and reduced the deduction for Federal income tax from the prevailing rate of 40% to 31%.

5. It provided that if by any chance the increase in rates granted by the order should be subject to excess profits taxes, that increase should be refunded to the consumers. (Under this provision the entire increase in rates

which had been paid by the consumers during the year 1942 was refunded to them.)

6. It approved a rate increase of only $201,000, although its own experts had testified that a rate increase of more than $324,000 should have been allowed.

7. The Commission found that the increase in rates would not have "material inflationary tendencies."

That was the decision of the Commission. It was unsatisfactory to the Administrator of the Office of Price Administration. It was certainly unsatisfactory to the Company.

The Commission's decision was designed to preserve the credit of the Company, sustain the adequacy of service to the public, and save the sliding scale arrangement for the consumers and for the Company. It is clear that the Commission considered all of these necessary and desirable in the interests of both consumers and investors. However, while the sliding scale arrangement was preserved, it was considerably bent in the process, and this was due to the Commission's serious consideration of the national interest and the necessity in that interest of keeping our wartime economy on an even keel and of preventing uncontrolled inflation. Every opportunity was taken to reduce the indicated rate increase, embarrassing as were the facts that the prices for labor and material paid by the Company had already skyrocketed, and that fair play and enlightened self-interest dictated close adherence to the sliding scale arrangement.

We submit that the problem involved was not an easy one. The result was certainly not perfect, and it was

unsatisfactory to many, but it was "the product of expert judgment which carries a presumption of validity". While the rate-making process involves "a balancing of the investor and the consumer interests", it here involved a balancing also of the national interest. (See dissenting opinion of Mr. Justice Jackson in *Federal Power Commission et al.* v. *Hope Natural Gas Co., supra.*)

The subsequent proceedings, in which the Director of Economic Stabilization was permitted to intervene and in which the Price Administrator participated, were an anticlimax. The Commission ordered (Order No. 2404) on October 23, 1942 (R. I, 62, 63) that the record in Formal Case No. 316 should be reopened for the purpose of receiving from the Office of Price Administration on behalf of the Director of Economic Stabilization "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401 and intervention is granted for such purpose." The reopened proceedings were set for public hearing on November 2, 1942 and were taken up largely in an argument by counsel for the Director of Economic Stabilization and for the Price Administrator that the scope of the hearings should be enlarged. No testimony was adduced at this hearing, and the hearing was adjourned until November 4th, on which day further argument was made and discussion had on the record with respect to the enlargement of the scope of the proceedings, and a witness was presented by counsel for the Price Administrator who testified that the amount used by the Company for Federal income taxes in its determination for the amount available for the increase in rates was overstated by approximately $18,000. This was the only evidence offered. The case was closed, and on November 9, 1942

the Commission issued its Order No. 2418 denying the petition to vacate Order No. 2401.

## CONCLUSION

As we have said before, this is essentially a controversy between two administrative bodies. The issue is not primarily the amount of the rates, but the *method* by which they were fixed. The Commission was faced with a choice of exercising its discretionary power over rate-making and following the laws applicable thereto, or of accepting the petitioners' judgment as to what it should do. It chose the former. Its action in this regard must be respected by this Court.

The order of the Court below and of the Commission should be affirmed.

Respectfully submitted.

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February 1944.

## APPENDIX

Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765:

> That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

> The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency

Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7: * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

The Emergency Price Control Act of 1942, 56 Stat. 23; Sec. 1 (a) (50) U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing ade-

quate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

District of Columbia Code (1940 ed.)

Section 43-301:

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 977, ch. 150, § 8, par. 2).

Section 43-305:

The commission shall ascertain, as soon and as nearly as practicable, the amount of money expended in the construction and equipment of every public.

utility, including the amount of money expended to procure any right of way; also the amount of money it would require to secure the right of way, reconstruct any roadbed, track, depots, cars, conduits, subways, poles, wires, switchboards, exchanges, offices, works, storage plants, power plants, machinery, and any other property or instrument not included in the foregoing enumeration used in or useful to the business of such public utility, and to replace all the physical properties belonging to the public utility. It shall ascertain the outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively, thereof, the date when issued, to whom issued, to whom sold, the price paid in cash, property, or labor therefor, what disposition was made of the proceeds, by whom the indebtedness is held, so far as ascertainable, the amount purporting to be due thereon, the floating indebtedness of the public utility, the credits due the public utility, other property on hand belonging to it, the judicial or other sales of said public utility, its property or franchises, and the amounts purporting to have been paid, and in what manner paid therefor, and the taxes paid thereon. The commission shall also ascertain in detail the gross and net income of the public utility from all sources, the amounts paid for salaries to officers and the wages paid to its employees, and the maximum hours of continuous service required of each class. Whenever the information required by this section is obtained it shall be printed in the annual report of the commission. In making such investigation the commission may avail itself of any information in possession of any department of the government of the United States or of the commissioners of the District of Columbia (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 6).

Section 43-306:

The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 7).

Section 43-317:

Nothing in chapters 1-10 of this title shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of chapters 1-10 of this title. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement (Mar. 4, 1913, 37 Stat. 980, ch. 150, § 8, par. 18).

Section 43-402. (See also Section 43-202).

The Commission shall have power to adopt reasonable and proper rules and regulations relative

to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it (Mar. 4, 1913, 37 Stat. 982, ch. 150, § 8, par. 32).

Section 43-706:

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, § 2).

Section 43-911:

Whenever, after hearing and investigation as provided in chapters 1-10 of this title, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1-10 of this title (Mar. 4, 1913, 37 Stat. 992, ch. 150, § 8, par. 88).

Section 43-1002:

The Commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and

it shall be its duty, to enforce the provisions of chapters 1-10 of this title as well as all other laws relating to public utilities (Mar. 4, 1913, 37 Stat. 993, ch. 150, § 8, par. 90).

Section 43-201:

The Public Utilities Commission of the District of Columbia shall be composed of three commissioners as follows: (1) The Engineer Commissioner of the District of Columbia, and (2) two persons appointed by the President, by and with the advice and consent of the Senate * * * (Dec. 15, 1926, 44 Stat. 920, ch. 8, § 1).

SENATE DEBATE

(88 Cong. Rec. 7973-7974.)

"Mr. Norris. Mr. President, I wish to refer to the action of the conference committee in including in the conference bill the language which the Senator from Michigan read and which takes the place of the amendment offered by me when the measure was before the Senate for consideration. It relates to utility rates and charges.

"What has been substituted by the Conference Committee for the original language agreed to by the Senate does not, technically, afford any relief whatever, although, morally, I think it will result in considerable relief.

"I intend to vote for the conference report, but I wish to call attention to the legal effect, as I understand it, of the language which has been substituted.

"The committee has provided that no utility rate shall be increased unless 30 days' notice shall be given the President by the corporation seeking the increase. There is also the requirement that in the notice it shall be agreed that the President may have the right, through any instrumentality he may select, to appear before the body having jurisdiction of the rate. I think I have stated the legal effect correctly.

"Mr. Brown. The Senator has stated it correctly.

"Mr. Norris. That does not give the President any right to pass on the question. It does not give him any right to appeal in case the Board's decision is against his representative's ideas.

"Mr. Brown. I would not be sure, if the Senator will pardon me, that his last statement is in accord with my own views. I think he would have the same right to appeal that any other interested party would have.

"Mr. Norris. I did not look at it that way. If he would have that right, it would add a great deal to the legal effect of the language which has been placed in the measure.

"Mr. Brown. He becomes a party to the proceedings, that is, his agent does.

"Mr. Norris. Yes, he does. The Senator's idea is that if under the law and the rules and regulations of the body having jurisdiction to hear the complaint, or the request, as it would be, an appeal is provided for, the President could avail himself of that right of appeal.

"Mr. Brown. Yes.

"Mr. Norris. I hope that will be the construction placed upon the language.

"Mr. Bone. Mr. President, will the Senator yield?

"Mr. Brown. I yield.

"Mr. Bone. I am assuming in asking the question that even though the President's representative would be technically a party in an appeal, he would merely have the right formally to present his views, or the views of the administration, to the regulatory body, but he would have nothing to say about its decision. If its decision were that the increase in rates should be granted, the decision would be final.

"Mr. Norris. If the Senator from Michigan has the correct idea, the President or his representative would have the right to appeal, as any party to the dispute would have the right to appeal.

"Mr. Brown. But with absolutely no authority to participate in the decision.

"Mr. Norris. No; with no authority to participate in the decision.

"Mr. Bone. That is what I meant by my question.

"Mr. Norris. As I said, I think that would have a great moral effect. The only thing the President's representative could plead for or urge when he appeared at the hearing would be that if the body then hearing the dispute should increase the rate, it would very likely interfere with all that the Price Administrator had done in the fixing of prices, because no one will dispute the utility rates enter directly into the cost of living. If gas rates, or electric rates, or water rates, or freight rates, or streetcar rates are increased, every single item of increase goes directly into the cost of living and hence interferes with any attempt to prevent inflation. After all, that is why I am deeply interested in this proposition; I want to prevent inflation, if possible. That is the object of our giving someone the authority to fix prices and freeze them at a certain level. If any persons or corporations have the power to increase any item of the cost of living, and it is done contrary to the order of the President or the Price Administrator, it will tend directly to overthrow the prices so fixed and will throw the whole structure out of gear, thus tending to increase the cost of living, and making it necessary to increase all other prices which enter into the cost of living, with the result that, as I believe, inflation will follow immediately.

"There would be a moral effect, however. When the President's representative appears before a tribunal having jurisdiction to fix or increase utility rates, he could say —and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation. If the tribunal increased utility rates during the war, notwithstanding the kind of showing made by the President's representative, it would

in my judgment have a great effect upon public sentiment. The tribunal, board, or commission which acted to increase rates, in the face of a showing that such action might lead to the worst kind of inflation, would find itself in a position which no board would want to be in. I think the provision in question will have a great moral effect. Therefore, I myself feel disposed to accept this language and vote for the conference report.

"Mr. President, I think I realize as fully as does any other Senator the earnestness, the fidelity, and the good faith with which the conferees on the part of the Senate have labored. We are all anxious to get through with this measure, and I think we should all be willing to sacrifice something we believe ought to be in the measure in order to have it finally passed. For that reason I do not believe we are justified in rejecting the conference report simply because in some particular it has not met completely with our ideas.

"I wanted to say this much, and by saying it in the Senator's time it is unnecessary for me to make a speech on the subject in my own time.

"Mr. Brown. I thank the Senator from Nebraska, and I want to say to him that I shall do what I can to expedite the hearing upon his bill which deals with the matter he has discussed.

"Mr. Norris. I am of the opinion that it would be rather useless to crowd that bill if the language now contained in the conference report becomes the law."